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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services	WT Docket No. 96-162
Implementation of Section 601(d) of the Telecommunications Act of 1996, and Sections 222 and 251(c)(5) of the Communications Act of 1934	DOCKET FILE COPY ORIGINAL
Amendment of the Commission's Rules to Establish New Personal Communications Services	GEN Docket No. 90-314
Requests of Bell Atlantic-NYNEX Mobile, Inc., and U S West, Inc., for Waiver of Section 22.903 of the Commission's Rules	

REPLY COMMENTS OF PACIFIC BELL, NEVADA BELL, PACIFIC BELL MOBILE SERVICES AND PACIFIC TELESIS MOBILE SERVICES

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TABLE OF CONTENTS

SUMMARY

In the interest of regulatory parity, we support the immediate elimination of Section 22.903 in favor of nonstructural safeguards proposed for the LEC provision of PCS. Some parties seek not only to retain 22.903 but to also extend similar structural separation to the LEC provision of PCS. The Commission has already concluded that nonstructural safeguards are the appropriate regulatory approach for the LEC provision of PCS. The comments provide no basis to change that decision.

The Commission has proposed that LEC provision of PCS be in a separate affiliate, but without complete structural separation. Consequently, all the costs associated with PCS are removed from the LEC's books. Thus, there is no need to amend the Part 64 rules to further delineate PCS costs.

The Telecommunications Act did not subject different carriers to different CPNI rules. The Commission should adhere to that mandate and apply the CPNI rules consistently to all carriers.

State regulations relating to the provision of PCS should be examined closely to ensure that they do not amount to de facto rate or entry regulations.

Joint marketing of PCS with LEC telecommunications services is expressly permitted by the Telecommunications Act. The Commission should not impose different rules relating to joint marketing on the LECs.

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I. INTRODUCTION.

In the Commission's Notice of Proposed Rulemaking ("NPRM") in this proceeding the Commission is considering whether to either retain the structural separation rules in Section 22.903 relating to BOC provision of cellular service for a limited period of time or immediately eliminate Section 22.903 in favor of the nonstructural safeguards proposed for LEC provision of PCS.[1] The Commission reaffirmed the application of nonstructural safeguards to LEC provision of PCS. In so doing, the Commission said: "[I]it serves the public interest to permit the LECs, including BOCs, flexibility in the provision of PCS through nonstructural safeguards as part of our efforts to introduce greater competition in the CMRS market."[2]

However, certain commenters are using this proceeding as an opportunity to reargue this issue and to advocate full structural separation for all provision of CMRS by a LEC. This issue was addressed in CC Docket No. 90-314, in which the Commission concluded "no new separate subsidiary requirements are necessary for LECs including BOCs that provide PCS."[3] Additionally, with the passage of the Telecommunications Act of 1996, the record in favor of nonstructural safeguards for the LEC provision of PCS is even stronger because of mandated regulatory oversight with respect to interconnection with local exchange carriers, as well as mandated network disclosure and Customer Proprietary Network Information ("CPNI") requirements.

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[1] In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services. Implementation of Section 601(d) of the Telecommunications Act of 1996, and Sections 222 and 251(c)(5) of the Communications Act of 1934. Amendment of the Commission's Rules to Establish New Personal Communications Services. Requests of Bell Atlantic-NYNEX Mobile, Inc., and U S West, Inc., for Waiver of Section 22.903 of the Commission's Rules, WT Docket No. 96-162 and GEN Docket No. 90-314, Notice of Proposed Rulemaking, Order on Remand and Waiver Order, released August 13, 1996.

[2] Id. at para. 109. The Commission proposed a separate affiliate requirement for PCS without full structural separation, para. 117 and 118.

[3] In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700, para. 126.

Our reply comments are limited to the issues related to LEC provision of PCS. We note, however, that one of the Commission's goals in this proceeding is "ultimately to eliminate any regulatory asymmetry between BOC provision of cellular services, on one hand, and BOC provision of other CMRS as well as LEC provision of any CMRS, on the other."[4] Thus, we support the immediate elimination of Section 22.903 and placement of BOC provision of cellular service under the same nonstructural safeguards as PCS.

II. NONSTRUCTURAL SAFEGUARDS REMAIN THE APPROPRIATE REGULATORY APPROACH FOR LEC PROVISION OF PCS.

MCI, Comcast Cellular Communications ("Comcast"), and CMT Partners ("CMT") advocate applying the BOC cellular structural separation rules to PCS.[5] The Commission carefully examined this issue in the PCS proceeding and its review of our safeguards plan. It correctly concluded that the public would benefit from economies of scope inherent in integration. In the meantime the Telecommunications Act of 1996 became law. The law sets forth interconnection requirements that apply to LEC-CMRS interconnection as well as network disclosure obligations and a CPNI requirement. These statutory requirements further buttress the Commission's conclusion that nonstructural safeguards afford more than sufficient protection because they not only codify some existing obligations but extend LEC obligations.

One of the claims is that LEC interconnection rates may be set high to put a price squeeze on the market. The Public Utilities Commission of Ohio alleges, "the price

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[4] Id. at para. 79.

[5] MCI, p. 5; CMT Partners, p. 14.

squeeze occurs when the LEC charges excessively high access rates which allow its own affiliate to operate at a low margin or even a loss while the company as a whole achieves a high profit margin."[6] This scenario is as unlikely now as it was in the past because LECs have always had an obligation to provide non-discriminatory interconnection to wireless providers at reasonable charges.[7] Thus, a party could (and can) challenge the reasonableness of an interconnection rate. The new law codifies this requirement by specifically stating that an incumbent local exchange carrier ("ILEC") has a duty to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection and on rates, terms and conditions that are just, reasonable, and nondiscriminatory...."[8] (emphasis added) Moreover, pursuant to the new law, Pacific Bell Mobile Services's interconnection agreement with Pacific Bell and Nevada Bell must be submitted to the state for approval.[9] Consequently, there are now statutory mandates that maintain regulatory oversight to ensure reasonable interconnection rates[10] and to ensure that Pacific Bell Mobile Services cannot obtain a more advantageous interconnection arrangement than another wireless provider.

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6 Public Services Commission of Ohio, p. 6.

7 In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, GEN Docket 93-252, Second Report and Order, 9 FCC Rcd 1441, paras. 230-234 (1994).

8 47 USC §241(c)(2).

9 47 USC §252(e)(1).

10 The Commission enacted stringent pricing rules which are now the subject of a stay. However, the Court made clear that states would continue to determine interconnection prices and referred to their "proven ability of the State Commissions to prevent incumbent LECs from charging excessive rates for their services." Iowa Utilities Board v FCC, No. 96-3321, (8th Cir. 1996), slip. op., p. 20.

CMT Partners maintains that structural separation is not overly intrusive.[11] CMT is wrong. It is very intrusive to dictate business structures and deny to only a certain class of competitors any economies of scale that may exist in their organizations. CMT takes the absurd position that because "combining operations would provide economies of scale not available to their competitors" it should not be allowed.[12] CMT misses the Commission's argument: the advantages of integration "promote more rapid development of PCS and ... yield a broader range of PCS services at lower cost to consumers."[13] The Commission is correctly concerned with the public benefit. The Commission is not charged with imposing regulations to make sure competitors have no advantages over each other.

III. FURTHER ATTACKS ON OUR SAFEGUARDS PLAN CONSTITUTE AN UNTIMELY PETITION FOR RECONSIDERATION.

The basis for the Commission's proposal on LEC provision of PCS in the NPRM is our safeguards plan.[14] Cox takes this opportunity to again attack the adequacy of our Plan and charges that the NPRM fails to address the concerns raised by the Plan.[15] This attack is simply an untimely petition for reconsideration. The Commission stated in its order

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[11] CMT Partners, p. 14.

[12] Id. at p. 12.

[13] Id. at para. 126.

[14] NPRM, para. 116.

[15] Cox, p. 4.

approving our Plan: "No party has persuasively argued that PacTel's plan is inadequate."[16] Consequently, there is no reason to revisit the concerns the Commission previously dismissed.

IV. COX AND COMCAST MISUNDERSTAND THE IMPACT OF THE COMMISSION'S NONSTRUCTURAL SAFEGUARDS ON THE ACCOUNTING RULES.

The Commission has proposed a separate affiliate for the provision of PCS service by a LEC. This is not a fully separate subsidiary as required by the current cellular rules. Instead, the Commission relies on the separation conditions outlined in the 1985 Competitive Carrier Fifth Report and Order.[17] One key requirement is that the affiliate must maintain separate books of account.[18] Cox agrees that a separate corporate affiliate similar to the Competitive Carrier separation conditions is the starting point.[19] However, it and Comcast advocate the need for more stringent Part 64 rules arguing that it is impossible to identify CMRS costs under the current Part 64 rules.[20]

They overlook the fact that once there is a requirement for a separate affiliate with its own books all CMRS costs are removed from the LECs' books. Part 64 is only relevant to the extent that it directs carriers to comply with the affiliate transaction rules in

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[16] In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services - Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis Mobile Services' Plan of Non-structural Safeguards Against Cross-subsidy and Discrimination, Order, released February 27, 1996, para. 5.

[17] NPRM, para. 118.

[18] Id.

[19] Cox, p. 5.

[20] Cox, pp. 5-6; Comcast, pp. 11-12.

Part 32.27.[21] Amending the Part 64 rules in an attempt to further delineate PCS costs would be a useless exercise because the PCS costs are already separate and are on the books of the affiliate. All transactions between the LEC and the wireless affiliate are then governed by the affiliate transaction rules.

Cox, Comcast, and AirTouch all advocate the disclosure of CMRS costs on a line-item basis in order to detect cross-subsidy. That is simply unnecessary.[22] We suspect their interest is rather more commercial than public-spirited and that they, like any competitor, simply want as much information as possible about their competitors. The FCC has full access to the annual accounting audits which determine compliance with affiliate transaction rules which are the only rules of relevance in this instance. That information is sufficient to ensure compliance with the accounting safeguards. There is certainly no reason why we should be required to disclose publicly the costs of a competitive service.

V. THE BOCS SHOULD NOT BE SUBJECT TO MORE STRENUOUS CPNI REQUIREMENTS THAN OTHER CARRIERS.

In the NPRM the Commission asked for comment on organizational and procedural guidelines for the protection and dissemination of CPNI that should apply to the PCS operations of any LEC or interexchange carrier possessing CPNI gathered in the provision of landline services.[23] As we indicated, it is difficult to comment without knowing the outcome of the Commission's CPNI proceeding. If the PCS operations are in a separate

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[21] 47 CFR §64.902.

[22] Cox, p. 7; Comcast, p. 13; AirTouch, p. 6.

[23] NPRM, para. 121.

affiliate as required in the Commission's LEC/CMRS safeguards proposal, and wireless services are treated as one telecommunications service "bucket" as proposed in the Commission's NPRM on CPNI, no organizational and procedural guidelines are necessary. The CPNI of wireless customers would be entirely separate from LEC CPNI and would only be shared pursuant to the consent procedures put in place by the Commission.

Some commenters have used this proceeding as an opportunity to reiterate their arguments that asymmetrical CPNI rules are permissible with more stringent rules applied to the LECs. AirTouch states "the key point is the LECs must have stricter limitations on their use of CPNI in the provision of competitive services than is warranted for the use of CPNI by non-LECs. To ensure that the LECs are not permitted unfair access to local exchange CPNI for the provision of CMRS affirmative written authorization from their local exchange customers must be obtained in advance."[24] AirTouch is wrong because it seeks to rewrite the Telecommunications Act and impose a requirement that is not in the Act.

Protection of privacy is not affected by the size or competitive status of the carrier holding CPNI. Congress had an opportunity to put different CPNI obligations on different carriers. It chose not to, instead making all telecommunications carriers subject to the same rule. AirTouch's argument should be rejected.

Comcast argues that "to avoid unequitable competitive outcomes, LECs that obtain customer consent to release customer CPNI to their CMRS affiliates should be obligated to share that CPNI with any requesting non-affiliated carrier."[25] Comcast also tries

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[24] AirTouch, pp. 6-7.

[25] Comcast, p. 16.

to rewrite the Act. This request is completely at odds with the Telecommunications Act which requires affirmative written request by the customer for release to a third party.[26]

Comcast goes on to state that such an obligation would not place a burden on the LEC but "would merely require the LEC to act as a clearing house that provides equal access to CPNI."[27] Again, this position ignores the Act. Congress did not intend for a LEC to act as a clearinghouse for equal access to CPNI. The customer controls access to his/her CPNI and may release that CPNI to whatever carriers he/she sees fit. There is no requirement that if one carrier has access any other carrier can also have access. Such a result stands the statute on its head.

MCI views access to customer information as a form of cross-subsidy since it defines subsidy as a BOC conferring "a monopoly based benefit" on a wireless affiliate.[28] This is simply an attempt to confuse and cloud the issue. Congress clearly found access to CPNI to be acceptable under appropriate parameters which the Commission is in the process of developing.

Congress could have adopted any of these proposals in the Act. It did not, and none of these parties provides any legislative history to support its interpretations. Therefore, the Commission should reject their positions.

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[26] 47 USC §222(c)(2).

[27] Comcast, pp. 16-17.

[28] MCI, p. 10.

VI. SWITCH BASED RESALE OF CMRS IS NOT REQUIRED.

MCI argues that one of the reasons to maintain structural separation of CMRS is because MCI Wireless has been unable to interconnect directly with the BOCs' and other local exchange carriers' cellular affiliates. MCI has stated thus it has been precluded from market entry on any basis other than a "'rebiller.'"[29]

The Commission has specifically found that CMRS providers are not local exchange carriers and are thus not subject to the requirements imposed on LECs and incumbent LECs.[30] Thus, there is no duty on the part of CMRS providers to offer direct interconnection to their networks. Moreover, the current resale requirement imposed on CMRS providers relates only to unrestricted resale of its service.[31] It does not extend to interconnection with the CMRS network for the purpose of resale.

VII. STATES MUST NOT BE ALLOWED TO IMPOSE ADDITIONAL LEC/CMRS SAFEGUARDS THAT THWART THE FEDERAL PURPOSE.

The Public Utilities Commission of Ohio ("PUCO") supports the continuation of full structural separation and advocates that "individual states should continue to impose, upon their own discretion, such standards [structurally separate affiliates] on companies providing local service in order to ensure a thriving competitive marketplace."[32] We urge the Commission to carefully examine state regulatory requirements that exceed federal requirements.

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[29] MCI, pp. 3-4.

[30] Interconnection Order, para. 1004.

[31] 47 CFR §20.12(b).

[32] PUCO, p. 4.

Wireless carriers often provide service in more than one state. A structural separation requirement imposed by one state, not imposed by other states, would mean either creating two different corporate structures for the provision of wireless services or operating the entire operation under the requirements of the most stringent state regulatory structure. Congress specifically sought to reduce regulation of CMRS carriers by allowing the FCC to forbear from applying certain Title II requirements and by preempting state and local entry and rate regulation.[33] The Commission must ensure that states do not exceed their authority to regulate the terms and conditions of CMRS service. Excessive state requirements can become a de facto form of entry or rate regulation or even blatant disregard for federal law.

For example, PUCO states that it disagrees with the joint marketing of PCS and LEC landline services and recommends that the marketing of such services be done by the carriers' respective separate affiliates.[34] PUCO's position is contrary to the Telecommunications Act of 1996 which specifically allows the joint marketing of CMRS in conjunction with telephone exchange service, exchange access, intraLATA telecommunications service, interLATA telecommunications service, and information services.[35]

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[33] 47 USC §332(c).

[34] PUCO, p. 20.

[35] Telecommunications Act of 1996, §601(d).

VIII. RULES RELATING TO JOINT MARKETING MUST BE APPLIED IN A CONSISTENT MANNER.

As noted above, Congress specifically provided for the joint marketing of CMRS with other telecommunications services. The Commission requested comment on whether to prohibit one-of-a-kind volume discounts for cellular service sold by the cellular affiliate to the affiliated telephone company for resale to the end user.[36]

MCI answered with a resounding yes, arguing that to permit such one-of-a-kind volume discounts would be to sanction discriminatory and anticompetitive pricing practices.[37] However, as BellSouth explains:

> In particular there is no basis for believing that there is any likelihood that BOC cellular entities would offer the BOC one-of-a-kind volume discounts for cellular service -- this was a speculative concern raised in objections [to BellSouth's Requests for Resale Authorization], without any factual basis. There is certainly no need for regulations or conditions to prevent such discounts. BOC cellular licensees, like all cellular licensees are prohibited from discrimination by Section 202(a) of the Act. Accordingly, there is no greater need for special conditions on BOC's resale of their affiliates' cellular service than there is for such conditions on AT&T reselling AT&T Wireless cellular service. Similarly, there are no special circumstances warranting any more public disclosure of a BOC's cellular affiliate's rates, terms and conditions than is the case with AT&T Wireless or any other cellular licensee that may be selling to an affiliated company for resale.[38]

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[36] NPRM, para. 67.

[37] MCI, p. 18.

[38] Bell South, n.127.

We strongly agree with BellSouth that no special rules are needed. In addition to Section 202(a), the affiliate transaction guidelines would govern the purchase of a service of an affiliate and would require that the CMRS service be sold to the LEC at the market rate.[39] Thus, any volume discounts would be at the level reflected in market prices.

Congress and the Commission have recognized the benefits of one-stop shopping. The joint marketing provision of the Telecommunications Act of 1996 was aimed at making that a reality for all telecommunications companies.[40] Existing rules are sufficient to deter discriminatory practices and those rules must be applied evenly to all carriers. As Bell South notes, the sale of AT&T Wireless Service by AT&T raises the same issues.

Finally, we concur with Bell South that the public disclosure of the rates, terms and conditions of the wireless service sold by a LEC should not be mandated. If the Commission does mandate public disclosure then it should apply equally to all sales of CMRS by affiliates such as affiliates of interexchange carriers and cable companies, not just BOCs or LECs. As noted above, the sale would be an affiliate transaction which is subject to annual audit. Thus, the Commission will have ample opportunity to review the appropriateness of the transactions.

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[39] 47 CFR §32.27(d).

[40] See, NPRM, para. 103.

IX. THE COMMISSION SHOULD CAREFULLY CONSIDER WHETHER ADDITIONAL AMENDMENTS TO OUR SAFEGUARDS PLAN OR INDIVIDUAL SAFEGUARDS PLANS BY OTHERS REMAINS NECESSARY.

Bell Atlantic notes that in addition to proposing a separate affiliate safeguard, the Commission would require the filing of a plan which would describe compliance with Part 32 and 64 accounting rules and with CPNI, interconnection and network disclosure obligations. Bell Atlantic states: "This rule would achieve nothing that is not already required of LECs."[41] BellSouth notes that issuance of the Interconnection Order moots the need for further interconnection and network disclosure obligations.[42] Similarly, Southwestern Bell states: "Forcing carriers to compile, file and periodically update plans which merely recite and detail compliance with existing laws is an inefficient use of carrier resources and inefficient use of Commission resources in reviewing and approving such plans."[43]

When we filed our plan we voluntarily agreed to apply the network disclosure obligations to Pacific Bell and Nevada Bell as they relate to PCS and to apply existing CPNI rules applicable to enhanced services to PCS. We did so to address the concerns of our competitors. The regulatory landscape has changed significantly since we filed our Safeguards Plan. The Telecommunications Act passed, which broadened network disclosure obligations, changed and expanded interconnection obligations, and created a new CPNI rule. These requirements, as well as the accounting safeguards in Part 32 and 64, exist

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41 Bell Atlantic, p. 16.

42 BellSouth, pp. 54-55.

43 Southwestern Bell, p. 18.

independently. Consequently, there is little value in having carriers recite how they will comply with statutory obligations. There are very powerful incentives to comply with requirements including the timing of the ability to offer interLATA service and the public trust associated with CPNI.

Similarly, upon further reflection we question whether it is still necessary for us to amend our Plan to recite our compliance with the new requirements. We will certainly do so if that is what the Commission desires. However, one of our concerns is that plan amendments simply offer an opportunity for our competitors to reargue issues that have already been resolved, much as some have done in this proceeding on the issues of structural separation and the adequacy of our Plan. Moreover, as the Commission knows, we already meet the separate affiliate requirement proposed by the Commission and all the other parts of our Plan are now subject to the new statutory requirements and penalties that attach for non-compliance.

X. CONCLUSION.

The Commission is correct that it serves the public interest to permit LECs, including BOCs, flexibility in the provision of PCS through nonstructural safeguards because consumers benefit. Some of our competitors want to hamstring our provision of PCS service as much as possible by imposing full structural separation. The Commission was right not to impose full structural separation in 1993 and with the passage of the Telecommunications Act of 1996 and its requirements on interconnection, network disclosure and CPNI, the Commission's position is stronger. We do not object to placing PCS service in a separate affiliate as we have already done. The telecommunications market, however, will undergo dramatic changes in the next few years. Congress has recognized that sunset provisions for other separate subsidiary requirements are appropriate. We urge the Commission to recognize that a similar sunset provision should apply to the separate affiliate requirement for PCS.

Respectfully submitted,

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